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VALIDITY AND EFFECT OF QUASI JUDICIAL ACTS OUTSIDE OF JURISDICTION.

Official acts of notaries,[1] commissioners,[2] justices of the

1. New England Co. *v.* Payne, 107 Ala. 578, 18 So. 164; Edingburgh Co. *v.* People, 102 Ala. 241, 14 So. 656; Fairbanks & Co. *v.* Getchell, 13 Cal. App. 458, 110 Pac. 331; Allgood *v.* State, 87 Ga. 668, 13 S. E. 569; Gray Lumber Co. *v.* Harris, 127 Ga. 693, 56 S. E. 252; Com. *v.* Schweiters, 122 Ky. 874, 93 S. W. 592; Silver *v.* Kansas City, etc., R. Co., 21 Mo. App. 5; Dixon *v.* Robbins, 114 N. C. 102, 19 S. E. 239; Mutual Life Ins. Co. *v.* Corey, 24 Hum. 493, 7 N. Y. Supp. 939 reversed on other grounds in 135 N. Y. 326, 31 N. E. 1095; White *v.* Manigan, 138 Tenn. 139, 196 S. W. 148; Bostick *v.* Haynie (Tenn.), 36 S. W. 856; Neeley *v.* Morris, 2 Head (Tenn.) 595, 75 Am. Dec. 753; Worley *v.* Adams, 111 Va. 796, 69 S. E. 929; Sullivan *v.* Gum, 106 Va. 245, 55 S. E. 535; Evans *v.* Dickenson, 114 Fed. 284, 52 C. C. A. 170.

"The jurisdiction of an officer elected and appointed is local. It is confined to the territorial area for which he is commissioned. Within that territorial area, whether large or small, he can perform official functions. Outside of it he is a private person, having no official power or jurisdiction. An act done by him beyond the boundaries of his local jurisdiction, no matter how formal he may make it appear, is a sheer usurpation, having no official validity; and this is true of official trust, from the highest to the lowest. 1 Am. & Eng. Enc. Law, 146, note 2; Share *v.* Anderson, 7 Serg. & R. 43; Bradley *v.* West, 60 Mo. 33; Rackleff *v.* Norton, 19 Me. 274; Code 1886, §§ 840, 1112." Edinburgh American Land Mortg. Co. *v.* Peoples, 102 Ala. 241, 14 So. 656, 657.

"It is claimed by the appellants that the deed of November 15, 1873, was properly acknowledged, although before a notary public outside of his own county. The argument is that the general provision of the Revised Statutes (1 Rev. St., 8th ed., p. 379, § 14), that notaries public may execute the duties of their office at any place within the state, applies to their power in taking acknowledgments of deeds. It was held to the contrary in re Railroad Co. *v.* Stewart, 33 How. Pr. 312, and in People *v.* Insurance Co., 65 How. Pr. 239." Mutual Life Ins. Co. *v.* Corey, 54 Hun. (N. Y.) 493, 7 N. Y. Supp. 939, 941. Reversed on other grounds in 135 N. Y. 326, 31 S. E. 1095.

2. Jackson *v.* Colden, 4 Cow. (N. Y.) 266.

peace,[3] or other officers [4] acting in a quasi judicial capacity when performed outside of the jurisdiction for which they are appointed or empowered to act are illegal and invalid. The recital in the act or certificate that it was performed within the notary's jurisdiction will not serve to render it valid, if in fact it was not so performed.[5] Nor does the fact that a notary in taking an acknowledgment outside of his jurisdiction waits to complete the instrument by writing it out or signing and sealing it after his return, have the effect of validating his prior invalid act.[6]

The territorial jurisdiction of these officers is dependent upon statute. In some states it is limited to the county for which the officer is commissioned but in others it is co-extensive with the state limits. Also the act to be performed may be limited as in New York a notary is empowered generally to act anywhere within the state, yet his authority given to acknowledge deeds is confined to the county for which he is commissioned.[7] The statutes of a state authorizing depositions out of the state to be taken "within the government where the witness may be found" [8] has been construed to mean any notary within the government who is qualified and entitled to act, at the place where the witness may be found and not to extend the powers of a notary to act at any place within the government.[9]

In a recent Tennessee case,[10] a notary public of that state went to New Orleans for the purpose of taking an acknowledgment of a deed of trust for a grantor who refused to make

3. Middlecoff *v.* Hemstreet, 135 Cal. 173, 67 Pac. 768; Grove *v.* Todd, 41 Md. 633, 20 Am. Rep. 76; Grayson *v.* Weddle, 80 Mo. 39; Share *v.* Anderson, 7 Serg. & R. (Pa.) 43, 10 Am. Dec. 421; Garth *v.* Fort, 15 Lea (Tenn.) 683.

4. Jackson *v.* Humphrey, 1 Johns. (N. Y.) 498, in which a county judge of the State of New York took in Canada the proof of the subscribing witness to a deed.

5. White *v.* Manigan, 138 Tenn. 139, 196 S. W. 148.

6. Ferebee *v.* Hinton, 102 N. C. 99, 8 S. E. 922; White *v.* Mangum, 138 Tenn. 139, 196 S. W. 148.

7. See Mutual Life Ins. Co. *v.* Corey, 54 Hun. 493, 7 N. Y. Supp. 939.

8. Missouri Statutes, § 2123.

9. Silver *v.* Kansas City, etc., Ry. Co., 21 Mo. App. 5.

10. White *v.* Manigan, 138 Tenn. 139, 196 S. W. 148.

it before a New Orleans notary. The validity of the deed was questioned by the general creditors of the grantor and in passing on the authority of the officer the court said:

> "An officer acting without jurisdiction is acting without authority, and his act is as though he had no commission to perform it. It is beyond question that an official of Tennessee is without authority to perform an official act in Louisiana. It is beyond his territorial jurisdiction. An attempt to perform an official act beyond the limits of the state is a plain usurpation. Therefore the deed of trust was not authenticated for registration, although it appeared to be properly acknowledged upon its face. It does not meet the question to say that the register must receive and record the instrument because it is not a question of notice. It is a question of authority in the notary to take the acknowledgment. The acknowledgment stands upon no higher ground than if it was forged or than if it was taken by one who had no color of authority to do so. We consider the question settled by previous decisions of this court. Neely *v.* Morris, 2 Head, 595, 75 Am. Dec. 753; Garth *v.* Fort, 15 Lea, 685; Bostick *v.* Haynie, 36 S. W. 856."

Depositions taken by a notary out of his county are not admissible in evidence,[11] and where depositions are taken by a notary and he acts without his county (such being his jurisdiction) the party giving false evidence cannot be indicted for perjury.[12] An affidavit which shows on its face that it is taken in a county other than that for which the notary was qualified is invalid to support a mechanic's lien.[13] In the case of Neely *v.* Morris,[14] it was said in reference to a protest of a note taken by a notary public out of his county:

> "This protest was a nullity. Under our statute, the authority of a notary public is confined to the county for which he was appointed and commissioned. Act 1835, c. 11. He has no more power or authority to do an official act in a different county than a justice of the peace or other county officer."

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11. Silver *v.* Kansas City, etc., Ry. Co., 21 Mo. App. 5.

12. Com. *v.* Schweiters, 122 Ky. 874, 93 S. W. 592.

13. Byrd *v.* Cochran, 39 Neb. 109, 58 N. W. 127.

14. 2 Head. (Tenn.) 596, 597, 75 Am. Dec. 753.

In Fairbanks, etc., Co. *v.* Gitchell,[15] an affidavit was made over the telephone by a party in one county to a notary in another county in which the notary had jurisdiction. In deciding the validity of the act the court said:

> "Assuming, but not deciding, that an oath may be administered and the obligations thereof assumed by communication had over the telephone, the validity of such act must be held to apply to those cases only where both notary and affiant are within the territorial limits for which the notary has been appointed and commissioned. At the time he made the affidavit and assented to the obligations of the oath, Meyer, the affiant, was in the county of Los Angeles. His act signifying his assent to the obligation must be deemed to have been had and done in Los Angeles county, where he then was. If untrue, it could not be claimed that he committed an act in swearing to a false affidavit in the county of Kern upon which a prosecution for perjury could be predicated, for the reason that it clearly appears he was not in Kern county when the act was committed. The oath was administered by a notary commissioned for Kern county to an affiant conceded to have been at the time in Los Angeles county, and, the notary being vested with no authority to administer an oath in Los Angeles county, it necessarily follows that the act was a nullity, and the purported affidavit upon which the attachment was issued was void and of no effect."

In Middlecoff *v.* Hemstreet,[16] the acknowledgment of a mortgage stated in its caption, body and in the *in testimonium* clause the name of one county but after his signature, the justice des-

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15. 13 Cal. A. 458, 110 Pac. 331.

16. 35 Cal. 173, 67 P. 768.

In Emeric *v.* Alvarado, 90 Cal. 477, et seq., it was said: "Now, the certificate of acknowledgment to the said deed to Patrick commences as follows: 'State of California, City and County of San Francisco,—ss. On this eighth day of December, A. D. 1879, before me, H. I. Tillotson, a notary public in and for the said city and county.' It is signed 'H. I. Tillotson, Notary Public.' At the end of the certificate he says he has hereunto 'affixed my official seal,' and he attaches a seal, as follows: 'Seal. H. I. Tillotson, Notary Public, Contra Costa County.' It was held in that case that the material statements in the certificates were not true, and that it was not sufficient on its face." Middlecoff *v.* Hemstreet, 135. Cal. 173, 176, 67 Pac. 768.

ignated another county. This was held invalid and insufficient as an acknowledgment.

The act of a justice of the peace in taking an acknowledgment out of his county is void and not even cured by a subsequent statute validating invalid acknowledgments.[17] In Grove *v.* Todd,[18] suit was brought by the widow of the grantor of a deed to establish her dower interest in land conveyed, the deed and acknowledgment while professing to have been acknowledged in one county before a justice thereof was in fact executed and acknowledged in another county. The court held the acknowledgment valid as to the heirs of the grantor under a statute validating defective acknowledgments, but as to the widow the acknowledgment was inoperative and void and on the question of the operation of such a statute upon the widow's dower rights the court said:

> "That the legislature may, in proper cases, by retroactive legislation, cure or confirm conveyances, or other proceedings, defectively acknowledged or executed, we entertain no doubt. As authority for the exercise of such power, we have long usage and many precedents. Such legislation is sustainable, because it is supposed not to operate upon the deed or contract, by changing it, but upon the mode of proof only. Journeay *v.* Gibson, 56 Penn. St. 57; Shonk *v.* Brown, 61 id. 321. And in this case we are of coinion that the Act of 1867, ch. 160, has operated to cure and make effectual the deed before us, as against the husband and his heirs. The deed was a good grant at the common law, as against the husband, and he executed it upon a strong moral consideration, apart from the fact that it was designed to carry out a long settled and determined purpose of his so as to dispose of the estate. But not so as to the wife. As to her, she being without capacity to make a deed or contract, except in a particular mode, not complied with in this case, the deed by which she is now sought to be barred was no more than a blank piece of paper; and as when vested rights are spoken of by the courts as being guarded against legislative interference, they mean those rights to which a party may adhere, and upon which he may insist without inflicting a wrong upon others (9 Gill 309), we think the right of the appellant in this case is of that character. She has

17. Grove *v.* Todd, 41 Md. 633, 20 Am. Rep. 76.
18. 41 Md. 633, 20 Am. Rep. 76.

a right to insist, according to the Declaration of Rights, art. 23, that she shall not be disseized of her freehold, liberties or privileges, or deprived of her property, otherwise than by the judgment of her peers, or by the law of the land; or, as these latter terms are defined, by due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. 2 Kent's Com. 13; The Regents *v.* Williams, 9 Gill & J. 412; Wright *v.* Wright, 2 Md. 452; Westervelt *v.* Gregg, 12 N. Y. 209; Reese *v.* City of Watertown, 19 Wall. 122. The deed being utterly void and without effect as to her estate, if she is now divested of her right of dower, it is by force of the statute and not of the deed; the statute operating through the form of the otherwise void deed to transfer the estate. To concede to the legislature the power, by retroactive legislation, adopted without the consent of the party to be affected, to accomplish such a result, is at once to concede to it the power to divest the rights of property and transfer them, without the forms of law, upon any notion of right or justice that the legislature may think proper to adopt: a concession that can never be made in a government where the rights of property do not depend upon the mere will of the legislature, and which professes to maintain a regular system of laws for the protection of the rights of property of its citizens."

A search of Virginia authorities has failed to reveal any direct decision covering this point. The court has said that such an act is illegal when deciding on the presumption of its validity.[19] In Carper *v.* McDowell,[20] the objection was that the certificate of the clerk was taken out of his office but this the court held a mere irregularity, prejudicial to no one.

PRESUMPTION OF VALIDITY.

In the absence of proof, the presumption is in favor of the validity of an officer's act, that it was performed within his jurisdiction and that he did not violate the law by acting outside of his jurisdiction, notwithstanding there is nothing in the act to show that it was performed within his jurisdiction.[21]

19. See Worley *v.* Adams, 111 Va. 803, 69 S. E. 929.

20. 5 Gratt. 212.

21. Dyer *v.* Flint, 21 Ill. 80, 72 Am. St. Rep. 73; Kesler *v.* Lapham, 46 W. Va. 293, 33 S. E. 289. See also, 4 Va. Law Reg. 342.

"We held in Hertig *v.* People, 159 Ill. 237, 50 Am. St. Rep. 162, that

In Worley *v.* Adams,[22] it is said:

"The case of Sullivan *v.* Gum, 106 Va. 245, 55 S. E. 535, * * * is instructive as to the spirit in which the courts interpret such certificates. It will be presumed that the acknowledgment was taken in the officer's county, although it is not so stated, for it would be an illegal act for the officer to perform beyond the limits of his county. Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774."

In Sullivan *v.* Gum,[23] the authorities cited are much more complete and of these it is said:

"In 1 Am. & Eng. Ency. of Law, 528, it is said: 'Where a conveyance is acknowledged before an officer authorized within the limits of his territorial jurisdiction to take acknowledgments, it will be presumed that the acknowledgment was taken within these limits, although this fact is not stated in the certificate'—citing Rackleff *v.* Norton, 19 Me. 274; Bradley *v.* West, 60 Mo. 33; Dunlay *v.* Dougherty, 20 Ill. 398; Morrison *v.* White, 16 La. Ann. 100; Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St.

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a notary public 'being a public officer, it will be presumed he administered the oath in the county within which he was authorized to administer oaths, for the presumption is that he has done his duty.'" Cox *v.* Stern, 170 Ill. 442, 32 Am. St. Rep. 385, 387.

"One defect charged against the attachment affidavit is that it was made before a notary of Greenbrier county, and does not show that the affiant appeared in that county, and took the oath specified in the affidavit. The answer to this point is that stated in Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, and that is that it will be presumed that the oath was taken in the officer's county, and that the officer did not do the illegal act of usurping jurisdiction or power to act outside of his county. See Quesenberry *v.* Association, 44 W. Va. 512, 30 S. E. 73." Kesler *v.* Lapham, 46 W. Va. 293, 33 S. E. 289, 290.

"Where a conveyance is acknowledged before an officer authorized to take such acknowledgment, within the limits of his jurisdiction, it will be presumed that such acknowledgment was actually taken within such limits. (The People *v.* Snyder, 41 N. Y. 397; Carpenter *v.* Dexter, 8 Wall. 513.)" Bradley *v.* West, 60 Mo. 33, 39.

"Here the caption of the statement is 'City of St. Louis,' and it is to be presumed that the notary was such for that city. Bradley *v.* West, 60 Mo. 39." Remington Sewing Machine Co. *v.* Cushen, 8 Mo. App. 528, 530.

22. 111 Va. 796, 803, 69 S. E. 929.

23. 106 Va. 245, 247, 55 S. E. 535.

Rep. 774. The West Virginia statute is very similar to our own, and in the last-named case the court remarked: 'But it is said that the certificate of the privy examination and acknowledgment of Mrs. Creigh is faulty, because it certifies that she appeared before the justice, without saying that she appeared in a particular county. The certificate has the caption: "State of West Virginia, Greenbrier County—to-wit:" It will be presumed that the act occurred in that county, and that the officer did not do an illegal act in taking an acknowledgment out of his county.' See also, Carpenter *v.* Dexter, 8 Wall. 513, 19 L. Ed. 426; People *v.* Snyder, 41 N. Y. 397; Coles *v.* Miller, 8 Grat. 6; Hassler's Lessee *v.* King, 9 Grat. 115; 1 Cyc. 574, note 62, citing cases in point."

In Hurst *v.* Leckie,[24] the objection was to the certificate not showing an officer authorized to take the same as he was designated as a commissioner in chancery without also stating that he was such for a court of record. But as the caption of the certificate was, "State of Virginia, City of Buena Vista" and the body of the certificate read, "a commissioner in chancery for the city aforesaid, in the State of Virginia" the court held this sufficient in view of the fact that there was only one court in the City of Buena Vista that had commissioners in chancery and that court was a court of record. In Cox *v.* Stern,[25] the caption of the affidavit was, "State of Illinois, County of Illinois," but as there was no such county in the state and the notary's seal was for Cook County the court held that the presumption that it was taken where the officer had jurisdiction applied.

This presumption is indulged even in cases where there may be an inference to be drawn from the document that it was performed outside of the jurisdiction. Thus where it was objected that the supporting affidavit for a change of venue was not properly authenticated, because in its caption it is entitled 'State of Iowa, County of Webster,' and it appears to have been sworn to before a notary public in Dubuque county, in the state of Iowa, presumption was indulged that the notary public took the affidavit within his own jurisdiction, as the caption did not show

24. 97 Va. 550, 24 S. E. 464, 75 Am. St. Rep. 798.

25. 170 Ill. 442, 48 N. E. 906, 62 Am. St. Rep. 385.

that it was sworn to in Webster county.[26] To a similar objection in Teutonia Loan, etc., Co. *v.* Turrell,[27] the court says:

> "In the case at bar, the officer was a notary in and for Hamilton county, Ohio, and the presumption is, that he acted within his jurisdiction and administered the oath where he had a right to administer it. It is true that the affidavit at the beginning would purport to have been made in Marion county, Indiana, but the words at the beginning are no more controlling than those at the close, where the officer designates his jurisdiction. We cannot presume that he violated the law of this state, and this we must do if we hold that the affidavit on its face purports to have been made in this state: Burns' Rev. Stats. 1894, § 2130."

On an appeal where it was objected that an affidavit made before a notary of another state was insufficient because the seal of the notary did not have the name of his state engraved thereon, the presumption was indulged that on the trial of the cause some showing was made that by the laws of the state in which the notary acted, the name of the state was not required to be engraved on the seal.[28]

The contrary rule as to presumption of validity was laid down in an early New York case[29] which was followed by the Kansas City Court of Appeals in Barhydt *v.* Alexander,[30] and in criminal cases where one is indicted for the crime of perjury for an affidavit made before an officer, no presumption is indulged but in such a case the authority of the officer must be shown.[31]

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26. Goodnow *v.* Litchfield, 67 Iowa 691, 5 N. W. 882.

27. 19 Ind. App. 469, 49 N. E. 582, 65 Am. St. Rep. 419, 421.

28. Goodnow *v.* Litchfield, 67 Iowa 691, 5 N. W. 882, 884.

29. Lane *v.* Morse, 6 Hon. Pr. (N. Y.) 394.

30. 59 Mo. App. 188, 193.

"An affidavit should show upon its face that it was made before an officer competent to take affidavits, and within some place where he was authorized by law to administer an oath. No presumption arises that an affidavit has been made at any particular place within the state nor that it was made within the limits of the state when no place is mentioned. Lane *v.* Morse, 6 How. Pr. 394." Barhydt *v.* Alexander, 59 Mo. App. 188.

31. Com. *v.* Schwieters, 29 Ky. Law Rep. 417, 93 S. W. 592. See also, Lambert *v.* People, 76 N. Y. 220, 32 Am. Rep. 293, holding that

But where depositions on their face are shown to have been taken out of the county of a notary a presumption that a notary had power to take them anywhere within a state will not be indulged, and in order to validate a deposition taken out of his county the laws of the state, if other than that of the forum, must be proved.[32]

EVIDENCE TO SHOW INVALIDITY.

It is permissible to show that the act was not performed in the place designated in the notarial certificate.[33] Thus where the plaintiff proposed to show that an acknowledgment and examination of a married woman was not taken in the county of the clerk of the court who took the acknowledgment, as stated therein, but was in fact taken out of the state, the evidence was held proper.[34] The Alabama Supreme Court in a case [35] where the acknowledgment of a married woman was taken in another county from that in which the notary had power to act, says, on the question of parol evidence to show this fact:

"If a justice of the peace for one county goes out of his own into another county and takes the acknowledgment of a

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in such proceeding the right of the notary to hold office may be shown in rebuttal of his authority.

32. Silver *v.* Kansas City, etc., Ry. Co., 21 Mo. App. 5. See also, Barhydt *v.* Alexander, 59 Mo. App. 188, holding the presumption will not be indulged in a case where no county is shown, the court also holding that the statement of a venue was essential to an affidavit.

33. Ferebee *v.* Hinton, 102 N. C. 99, 8 S. E. 922. See also, White *v.* Manigan, 138 Tenn. 139, 196 S. W. 148, where the fact was proved by parol evidence but no objection is show to have been raised to its admission. See to the contrary Titus *v.* Johnson, 50 Tex. 224.

"The certificate, though in form correct, may be rebutted. Thurman *v.* Cameron, 24 Wend. 87; Sanderland *v.* Adams, 2 How. Pr. 127." Mutual Life Ins. Co. *v.* Corey, 54 Hun. 493, 7 N. Y. Supp. 939, 942. Reversed in 135 N. Y. 326, 31 N. E. 1095 on the ground that the *grantor or one deriving title from him* was estopped to impeach its validity.

34. Ferebee *v.* Hinton, 102 N. C. 99, 8 S. E. 922.

35. New England Mortgage & Co. *v.* Payne, 107 Ala. 578, 18 So. 164.

married woman to a deed purporting to convey her homestead, the conveyance would be void as to the homestead. It is competent to show this fact by parol, though it may appear to the contrary on the face of the acknowledgment; and the representations of the defendant that it was acknowledged in the county of the residence of the justice of the peace would not estop him from proving by parol that the acknowledgment was taken in another county. Edinburgh Am. Land Mortg. Co. *v.* Peoples, 102 Ala. 241, 14 South. 656."

Even the officer who has acted in excess of his jurisdiction is a competent witness to the fact.[36] Thus where proof of a deed is taken by a county judge outside of the state, he is a competent witness as to such fact, though he could not be compelled to answer any questions tending to impeach his conduct as a public officer.[37] In Qualls *v.* Qualls,[38] though the case was not on the territorial jurisdiction of the officer, the question was as to the right to impeach a certificate of acknowledgment by having the officer himself testify, the court said:

"In many jurisdictions it is held that the officer is not a competent witness to contradict or impeach his certificate of acknowledgment to a conveyance. Stone *v.* Montgomery, 35 Miss. 83; Greene *v.* Godfrey, 44 Me. 25; Cent. Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597; McKellar *v.* Peck, 39 Tex. 381; Hockman *v.* McClanahan, 87 Va. 33, 12 S. E. 230; Wooldridge *v.* Wooldridge, 69 W. Va. 554, 72 S. E. 654, Ann. Cas. 1913B, 653; 1 Dev. on Real Estate (3d ed.) § 532; 1 Corpus Juris, p. 895, § 282. * * * The question of the validity vel non of the instrument, as respects the competency of the officer taking the acknowledgment, must be raised in a direct, and not a collateral attack. Vizard *v.* Robinson, 181 Ala. 349, 61 South.

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36. See Effenberger *v.* Durant (Okla.), 156 Pac. 212; McCurley *v.* Puiter, 65 Ill. App. 17; Mays *v.* Pryce, 95 Mo. 603, 8 S. W. 731.

"In some states the officer taking the acknowledgment is not a competent witness to prove facts impeaching his certificate. His exclusion as a witness is not put upon the ground of any disqualifying statute, but from considerations of public policy. Bank *v.* Copeland, 18 Md. 305; Harkins *v.* Forsyth, 11 Leigh, 307." Mutual Life Ins. Co. *v.* Corey, 135 N. Y. 328, 31 N. Y. 1095, 1096.

37. Jackson *v.* Humphreys, 1 Johns. (N. Y.) 498.

38. 196 Ala. 524, 72 So. 76.

959; Monroe *v.* Arthur, 126 Ala. 362, 28 South. 476, 85 Am. St. Rep. 36; Hayes *v.* B. & L. Ass'n, 124 Ala. 663, 26 South. 527, 82 Am. St. Rep. 216. Where, however, the officer was without jurisdiction, in that there was no examination of the reputed grantor, and no acknowledgment before the officer, then such a certificate is void because not authorized by law to be made, and it may be attacked collaterally, as is now sought to be done. Chatta. N. B. & L. Ass'n *v.* Vaught, 143 Ala. 389, 39 South. 215; Parrish *v.* Russell, 172 Ala. 1, 55 South. 140; Gilley et al. *v.* Denman, 185 Ala. 561, 64 South. 97."

The precise point of evidence to impeach a certificate when made by an officer out of his jurisdiction has never been passed upon by the Virginia Court. The rule is that the certificate of an officer sufficient to admit the instruction to registration is conclusive [39] in Murrell *v.* Diggs,[40] the court says that:

"In Carper *v.* M'Dowell, 5 Grat. 212, it was said by Judge Baldwin, in delivering the opinion of the court, that 'it may be laid down without qualification that the registration of a deed regular upon its face cannot be contradicted by evidence in any collateral controversy. Thus, in an action of ejectment for the recovery of land, if the title turns upon the due registration of a deed, the registry itself is the only legitimate evidence upon the question, and parol evidence is inadmissible to prove that it was not duly proved or acknowledged, and admitted to record, even though the registration was fraudulently procured.' And in the same case it was said that not only is a proceeding to register a deed, which is regular on its face, not impeachable collaterally by any evidence whatever, but that it cannot be impeached even directly, except in a court of equity, and not even there except upon the ground of fraud or upon some other ground which reaches the conscience of the party. The same principle was asserted in Harkins *v.* Forsyth, 11 Leigh 294, in which case it was decided that a certificate of two justices of the peace of the privy examination of a married woman could not be contradicted by parol evidence, there being no allegation of fraud. The privy examination of a married woman, it was said, is, in Virginia, a substitute for the ancient common-law proceed-

39. Burson *v.* Andes, 83 Va. 445, 8 S. E. 249; Harkins *v.* Forsyth, 11 Leigh 306.

40. 84 Va. 900, 6 S. E. 461.

ing by fine in a court of record, which derived its name from putting an end not only to the suit, but to all controversies concerning the same subject-matter; and could be relieved against only for fraud in the court of chancery. See also, Hitz *v.* Jenks, 123 U. S. 297, 8 Sup. Ct. Rep. 143; Davis *v.* Beazley, 75 Va. 491; Bank *v.* Paul, id. 594."

However, in Bell *v.* Wood,[41] it is said in the opinion:

"It cannot be assumed that an officer has been guilty of improper conduct in the discharge of a duty incident to his office though such a fact may be shown by proof when put in issue."

And on a remand parol evidence was admitted to show that an officer who acknowledged a deed of trust was the same person named therein as the trustee and it was held that such a deed when recorded was ineffectual as notice to subsequent purchasers for value.[42]

Evidence sufficient to overcome the presumption of due execution must be clear and satisfactory to the contrary, "such as is required for the reformation or rescission of a deed or other instrument on the ground of mistake." [43]

ESTOPPEL TO DENY VALIDITY.

Should the instrument disclose that it was performed outside of the officer's jurisdiction it would not operate to estop a party from asserting its validity.[44] So where, in the body of the instrument acknowledged by a notary, it is stated that he is a notary for a certain county but his official seal shows that he is a notary for another county only, this is sufficient to put a party upon inquiry as to his authority to act in the premises.[45] However, an act complete and valid on its face cannot be impeached by parties to it.[46] The act of a mortgagor and mort-

41. 94 Va. 677, 685, 27 S. E. 504.

42. Hinton *v.* Wood, 101 Va. 54, 43 S. E. 186.

43. Maxwell *v.* Hartman, 50 Wis. 660, 665, quoting Pringle *v.* Durrer, 37 Wis. 449.

44. Mutual Life Ins. Co. *v.* Corey, 135 N. Y. 326, 31 N. E. 1095.

45. Evous *v.* Dickerson, 114 Fed. 284, 52 C. C. A. 170.

46. Mutual Life Ins. Co. *v.* Corey, 135 N. Y. 326, 31 N. E. 1095. See also, Stewart *v.* Stewart, 19 Fla. 848.

gagee in having an acknowledgment taken out of a state by an officer authorized only to act therein, estops them from contesting the validity of the mortgage on this ground when it has been assigned to a bona fide purchaser for value.[47] Thus where the facts were that plaintiffs and defendants claimed from a common grantor, the former under a mortgage given in 1877, the latter under a conveyance executed and recorded in 1873; the deed was in every respect perfect and sufficient to convey the fee, had been freely and voluntarily executed, for a good but not a valuable consideration, acknowledged at the home of the grantor before a notary who laid the venue in his proper county; the defendants were the minor children of the grantor but no collusion was charged or proved between the grantee and the notary nor was it shown that the grantor was the victim of any fraud, imposition or duress, the Court of Appeals of New York in the case of Mutual Life Ins. Co. *v.* Corey says,[48]

> "Upon these facts, we think it cannot be doubted that the plaintiff's grantor, by the act of execution and delivery of the deed, became estopped from insisting, as against these defendants, that it was not duly acknowledged. It is, in form, unassailable, and purports to be a literal compliance with the requirements of law to make it a valid grant of the entire title; and he could not be permitted to say that it does not speak the truth, or that, after its execution, there still remained in him the power to grant the property to another, and thus defeat its operation as a conveyance. If the acknowledgment out of the county of the notary's residence was unauthorized, the plainest principles of justice would seem to require that the grantor should be debarred from subsequently asserting, to the prejudice of the innocent grantees, that he co-operated with the officer to place upon the instrument a false certificate, which, if honestly done, was an error of judgment, and, if done with evil intent, a crime. The due acknowledgment of the instrument must be held to be beyond the reach of successful contradiction by him. He assumed to convey a title, good as against subsequent purchasers and incumbrancers; and it is now sought to cut down the estate so apparently con-

47. Jackson *v.* Colden, 4 Cow. N. Y. 266.
48. 135 N. Y. 328, 31 N. E. 1095.

veyed to a partial or modified grant, as it was termed in Chamberlain *v.* Sprague, 86 N. Y. 608; or, adopting the descriptive words of the opinion in that case, to convert 'a perfect and duly-executed grant' into 'an imperfect and unattested one.' The grantor cannot in this way assail or destroy his grant. He is bound, as between him and his grantee, to uphold the verity of every material fact and admission contained in it. The rule is thus laid down in 2 Hemr. Estop., p. 743, § 607: 'Where a conveyance sets forth the facts necessary to render it valid, it is conclusive against the grantor, whatever may be its effect as between the grantee and third persons.' And, again, (page 749, § 613:) 'when a deed recites the existence of facts which render it valid unless contradicted, the recital may take effect as an estoppel.' Also, (page 718, § 585:) 'So he cannot object that it [his deed] is inoperative by reason of informality of execution.' Exceptions are allowed in favor of matters not affecting the estate granted, such as the consideration, the date, and the life; but even these are carefully guarded, so as to let in parol proof which will subvert the grant. It may be shown that the true consideration is not expressed, but not that there was no consideration, if one is recited. The actual date of execution may be proven, although differing from the date named, unless the effect of the contradiction would be to vary the operation of the instrument, or defeat some right evidently intended to be conveyed, in which cases the recital of the date is conclusive. We think it may therefore be safely affirmed as a general principle that, where the owner executes and delivers a deed of real property, containing upon it a certificate of his appearance before an officer authorized by law to take acknowledgments, at a place within his jurisdiction, and an acknowledgment of its execution, and the certificate is signed by the officer, he cannot subsequently alleged the invalidity of the certificate, even upon a jurisdictional ground, for the purpose of impairing the estate of the grantee."

To the objection that if the act was void it could not be validated by an estoppel, the destruction is between an act, which on its face is defective, and one which is apparently valid.

"The distinction is very clearly pointed out by Judge Finch in Veeder *v.* Mudgett, 95 N. Y. 295. Where, under the law, there is an entire lack of power to do the act in question, it cannot be made good by estoppel. But if the power to do

the act existed, and there was a way in which it could be lawfully exercised, and it purports to have been done in a lawful way, a person who has induced another to act upon the assumption that it was in fact done in the manner in which it purported to have been done may be estopped from questioning its validity." [49]

DAUNIS MCBRIDE.

49. Mutual Life Ins. Co. *v.* Corey, 135 N. Y. 328, 31 N. E. 1095, 1096.